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ASSOCIATION OF AMERICAN RAILROADS

Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564DEPT. OF TRANSPORTATION
DISCREET SECTION

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Daniel Saphire
Assistant General CounselPhone: (202) 639-2505
Fax: (202) 639-2868
E-Mail: dsaphire@www.aar.org

April 19, 1999

BY MESSENGER & FAXDocket Clerk
U.S. DOT Dockets
Room FL-401
400 Seventh Street, SW
Washington, D . C . 20590-0001Re: **FHWA Docket No.** m-98-3656 - 47

Enclosed please find a copy of the comments of the Association of American Railroads in response to Advanced Notice of Proposed Rulemaking in the above-referenced docket. Also enclosed is an **additonal copy** and self-addressed, stamped envelope for an **acknowledgement** of receipt. Thank you for your attention to this matter.

Sincerely,

Daniel Saphire

Enclosure

BEFORE THE
FEDERAL HIGHWAY ADMINISTRATION

DOCKET NO. FHWA-98-3656

GENERAL REQUIREMENTS INSPECTION, REPAIR,
AND MAINTENANCE: XNTERMODAL CONTAINER
CHASSIS AND TRAILERS

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

On behalf of its member railroads, the Association of American Railroads (AAR)¹ submits the following comments in response to FHWA's advance notice of proposed rulemaking seeking comments on the petition of the American Trucking Associations, Inc., (ATA) and ATA's Intermodal Conference (Petitioners) proposing to alter the allocation of responsibility for ensuring that intermodal equipment complies with FHWA regulations.² AAR's member railroads have a significant stake in this rulemaking proceeding because they are involved in the transportation of a substantial amount of freight in intermodal equipment and, as a result, frequently tender such equipment to motor carriers.

AAR opposes Petitioners' proposal as it would effect a fundamental change to the regulatory framework, the need for which has not been demonstrated. Even assuming FHWA has jurisdiction to expand the scope of its regulations to cover entities that do not operate motor vehicles, the Petitioners have presented scant evidence to support their case. In fact, enactment of Petitioners' proposal could well be counterproductive to the goal of improved safety on the highways.

¹AAR is a trade association whose membership includes freight railroads that operate 76 percent of the line-haul mileage, employ 91 percent of the railroad workers, and account for 93 percent of the freight revenue of all railroads in the United States. Amtrak, which operates almost all of the nation's **inter-city** passenger trains also is a member of AAR.

²64 Fed. Reg. 7849 (Feb. 17, 1999).

Railroads move large volumes of intermodal equipment, transporting nearly 8.7 million trailers and containers in 1997.³ Railroads and motor carriers frequently are partners in providing transportation of freight moved in trailers and containers. However, each partner moves this equipment in **entirely** different environments, posing different safety issues. When moved by railroads, the equipment is secured to a **rail car**. The primary interest of the railroad is, as it should be, to assure the equipment can be operated safely, in rail transportation. Thus, railroads inspect to make sure that all **intermodal** equipment is properly secured to the rail car and will not pose any hazards when moving **on the railroad right of way**. On the rails, the proper operation of the intermodal equipment's brakes, lights and tires is not key to safe operations. Moreover, there is unlikely to be any degradation of these systems while the equipment is moving on the rails, since these systems are used only within **intermodal terminals** while in the possession of the railroad. (In fact, in many cases these systems **are** not **even** involved in the part of a move that takes place on the rails. For example, in double stack service, the container is moved by itself. The lights, brakes and tires are part of the chassis, and are attached only after the rail transportation has ended.)

Once intermodal equipment is removed from the train and tendered to the motor carrier which will be operating the equipment on the highway, the operator of the carrier should bear the responsibility for ensuring the equipment complies with federal regulations. At that point, when safe operation on the highway becomes the focus, the condition of the brakes, lights and tires becomes of paramount importance. The motor carrier operator is in the best position to determine whether these systems on the trailer, container or chassis that he or she will be pulling on the highway are in proper condition. On the highway, the trailer, container or chassis becomes an integrated piece of equipment **with** the operator's tractor. The operator certainly is in the best position to know whether the intermodal equipment **is** properly connected to the tractor and to judge the **roadworthiness** of the unit as a whole.

Essentially, Petitioners argue that operators of motor carriers are incapable of inspecting the equipment they will be operating on the highways after it is tendered to them by another party in the transportation chain. Just why the operator cannot conduct an inspection upon receiving equipment is not apparent.

³ ASSOCIATION OF AMERICAN RAILROADS, **RAILROAD FACTS** 26 (1998 ed.) . This represents a threefold increase over the past two decades.

The inspection that should be done by motor carriers is not complicated. Section 392.7, 49 C.F.R., lists the items that a motor vehicle driver is responsible for: brakes, the steering mechanism, lights, tires, horn, windshield wipers, mirrors, and coupling devices. A motor vehicle driver can readily inspect these items without incurring any significant delay.

Certainly, any individual who is qualified to operate a tractor-trailer/container combination over the highways must be sufficiently trained to inspect that equipment. In order to receive a commercial drivers license, an operator must be capable of performing a pre-trip inspection required by the regulations. 49 C.F.R. §§383.111(e) and 383.3.13(c) (1). **Commercial** drivers are required to demonstrate their ability to perform §392.7 pre-trip inspections in order to drive the **type** of commercial motor **vehicle** the motor carrier intends to assign them. 49 C.F.R. §391.31. If a motor carrier's drivers do not know how to properly inspect the intermodal equipment they handle, the motor **carrier** cannot permit them to operate this equipment.

While **there** may be a financial incentive for the operator to leave the terminal as soon as possible, it is the motor carrier's responsibility to ensure that incentive does not override the need for taking the time to complete an inspection to determine that the various components **of** the equipment are in proper operating condition. (As noted above, the operator should be capable of conducting an adequate inspection without significant delay.) Moreover, if, after inspection, the operator believes that the equipment is not safe to operate, he or she may decline to leave **the terminal** with that equipment in tow: in some cases another piece of equipment may be **available**. Again, there may be financial incentives for the operator to leave a terminal with **the first** available piece of equipment, but that should not override safety concerns.

Petitioners contend that motor carriers do not own or control the intermodal equipment they haul, and therefore are not in a position to inspect them adequately. While railroads do own or lease some of the intermodal equipment in use today, it **will** frequently be the case that the railroad tendering a piece of equipment **is** not the owner or **lessee** of that equipment either, as much of that equipment is owned by steamship lines, motor carriers, leasing companies, and other **parties**. Moreover, the railroad does not have control over the equipment: as it moves over the **transportation** network on different modes. Given the reality of equipment which is frequently on **the move**, passing from party to **party**, it is only logical and fair that when the

focus is on highway safety the party operating the equipment over the highway bear the responsibility **for** its safe operation.

Putting responsibility on the non-motor carrier which tenders the equipment will **only** further militate against diligent inspection of the equipment by the operator. Rather than providing motor carriers with a stronger argument for refusing unsafe equipment as Petitioners suggest, if responsibility for the roadworthiness of intermodal equipment is shifted to the party tendering the equipment, the motor carrier operator will be less likely to undertake a diligent inspection before leaving the terminal, as he or she will be able to allege that any defect discovered on the highway was the responsibility of the terminal operator to detect and correct.

In fact, under Petitioner's proposed amendment to Section 390.37, a motor carrier found to be operating equipment **in** violation of the FMCSRs can avoid penalty by arguing that the equipment was tendered in a condition which did not comply with the rules. Of **course**, in most cases, if a defect is discovered on the highway, it is unlikely that the inspector would be able to determine whether the defective condition arose on the highway or **prior** to it having been tendered to the motor carrier. (This scenario also would raise the question of why, if the **operator** believed the equipment not **be in compliance** with the safety rules when it was tendered he or she nonetheless took it onto the highway.) Thus, rather than enhancing safety, Petitioner's notion of joint responsibility may undermine it, as both parties will **often** be able to argue--and have incentive to do so--that the problem arose when the equipment was under the control of the other party. Joint responsibility will confuse the roles of the various parties, **dilute** the operator's responsibilities, and may, as a practical matter, be tantamount to no responsibility.

While the condition of the basic systems of a piece of intermodal equipment should be ascertainable upon completion of an inspection by the motor **carrier operator at a** terminal, it is possible that some latent defects might not be detected by such an inspection. It is equally unlikely, however, that such a defect would be detected by shifting the responsibility for inspection to a non-motor carrier. If latent defects are a problem affecting the safety of intermodal equipment, then the more appropriate solution would seem to be either beefing up the currently required annual inspection or requiring that such inspections occur more frequently.

Petitioners are correct that typically, commercial contracts provide that once motor carriers take intermodal equipment off

railroad premises, the motor carrier is responsible for the condition of the equipment. Though Petitioners imply that these contractual provisions are a problem, in fact, they simply reflect rational and long-standing business practices. These negotiated allocations of responsibility recognize the proper role of the motor carrier in ensuring the roadworthiness of equipment operated on the highways.

Petitioners' proposal is particularly alarming in that it would abrogate these private contracts. Proposed section 396.7(c) would void the contractual allocation of responsibility assigned the motor carrier based on an assertion that the party tendering the equipment did not provide the motor carrier with "adequate equipment, time, and facilities to make a full inspection and necessary repairs" to the equipment. By allocating responsibility for the safety of equipment on the highway to the motor carrier, these agreements reflect the reality of intermodal transportation. However, under Petitioners' proposal, these provisions will be rendered meaningless, as the motor carrier can always contend that it was given "inadequate" time, equipment or facilities to undertake a proper inspection. Certainly, no case has been made for upsetting the business agreements that have been developed over the years by the parties involved in intermodal transportation.

In order to explore the issues raised by its ANPR, FHWA has posed a series of questions. AAR responds to several of these questions below.⁴ With respect to FHWA's inquiry concerning the occurrence and frequency of equipment defects and safety rule violations, AAR does not have any relevant data. Other interested parties may well have such data. Even if such data exist, however, it is unlikely that they would enable FHWA to ascertain whether Petitioners' proposal will result in any safety benefits. This is underscored by the premise of question 5 which points out, correctly, that in most cases it would be difficult to determine whether an equipment defect arose before or after the equipment was tendered to the motor carrier.

Question 6, which suggests holding the tendering party responsible for the condition of equipment even after it has been on the road for some time, points out the unworkability and unfairness of Petitioners proposal. A railroad does not control the route or method of operation on the highway. To hold a party responsible for the condition of equipment after it has left that

⁴ Question 3, regarding the Uniform Agreement, has already been addressed in the body of AAR's comments.

party's control and has been operated on the road for many miles by another party makes no sense. There is no rational basis for arbitrarily fixing a number of miles or hours after which responsibility should be shifted *from* equipment tenderer to motor carrier, as no presumption can properly be made about when a defect **occurred**. In fact, if equipment is defective at the time of tender to the motor carrier, the defect likely occurred the last time the **equipment** was operated on the highway. Lights, tires and other features essential for highway safety are not used during rail transportation.

With respect to question 7, the underlying premise, i.e., that drivers do not have the ability or opportunity to **inspect** equipment for roadworthiness at the point of interchange or tender, is false. Ability exists, or at least it should: as stated above, drivers must be trained and qualified to inspect the vehicles they operate. Opportunity also exists: the question is whether drivers are willing to take that opportunity, a matter **that is within their control**. One AAR member reports that a recent study showed that only **about 5% of driver** picking up intermodal equipment at terminals took advantage of special roadability lanes provided for inspections.


Regarding question 8, **AAR** does not have any comprehensive data on the resources expended by its members on inspection, repair and maintenance of intermodal equipment or what impact adopting Petitioners proposal would have on those expenditures. One large railroad has estimated that if the proposal were implemented, the number of mechanics utilized would need to be increased by over 50% and expenditures would rise by about \$8 million annually. An important point here is that even if this were done, there should be no concomitant reduction in manpower or cost to motor carriers. There will still be one driver for every truck.

With regard to question 13, **AAR is** not aware of **evidence** to support increasing **the frequency** of the FHWA inspections. However, as noted above, if latent defects in intermodal equipment are a problem, requiring more frequent or stringent inspections might be an **appropriate response**. AAR understands that **IANA** is in the process of studying the question of whether more frequent inspections would be beneficial.

When a fundamental change is proposed to a regulatory scheme, the burden should be on the proponents of change to demonstrate that (1) a significant problem exists and (2) the proposed solution will address the problem effectively,

efficiently and fairly. Petitioners have done neither.
Accordingly, AAR urges FHWA to reject the petition.

Respectfully submitted



Michael J. Rush
Daniel Saphire

Association of American Railroads
50 F Street, NW
Washington, D.C. 20001
(202) 639-2503